Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

No. 92-13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES L. GRIMES,

Petitioner,

v.

JOHN P. McCARTHY PROFIT SHARING PLAN, VITALINK COMMUNICATIONS CORPORATION, LESLIE DENEND, and NETWORK SYSTEMS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

PETITIONER'S REPLY BRIEF

THADDEUS HOLT
910 16th Street N.W.
Suite 400
Washington, D.C. 20006
202-223-9010

Attorney for Petitioner
(Counsel of Record)

August 4, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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PETITIONER'S REPLY BRIEF

I. Respondents' Contention That This Court Lacks Jurisdiction Over This Matter Rests on Cases That Are Wholly Different From the Situation Here

Respondents do not suggest that the question of adequate representation was not raised below. They could hardly do so, given the vigorous efforts by petitioner described at pp. 7-10 of the Petition for Certiorari (hereinafter cited as "Pet."). Rather, they argue that this Court lacks jurisdiction because the federal constitutional aspect of the question presented was allegedly neither raised nor decided below. This argument rests mainly on out-of-context quotations from opinions that do not fit this case. The easiest way to deal with this is to walk through the basis for the Court's jurisdiction here point by point.

The rule that distills from this Court's modern opinions can be stated as follows: This Court lacks juris-

diction only if the federal question in issue was *neither* actually considered and decided below, *nor* raised below. If the court below actually discussed and decided the question, there is no problem of jurisdiction here. If the court below was silent on the question, it will be assumed that this was because the question was not properly presented below, unless examination of the record shows that it *was* presented. No magic formula is required for presentation, as long as it was so presented that the court below could have addressed it consistently with state procedural rules; though a vague reference to, *e.g.*, mere "unconstitutionality," without giving any clue as to what constitutional provision is involved or as to whether it is the federal rather than the state constitution that is invoked, is not enough. If examination of the record shows the question was presented, and if the actual decision below is consistent only with a decision of that question against petitioner, this Court has jurisdiction.

As we pointed out in our petition, in this case the issue of adequate representation was first raised to constitutional dimensions when the Court of Chancery issued its decision without even examining petitioner's contention that the settlement was a sham. (*Cf. Chambers* v. *Mississippi*, 410 U.S. 284, 290 n.3 (1973), where the petitioner's constitutional claim was based on the cumulative impact of individual rulings on evidence and thus could not have been raised before the close of the petitioner's evidentiary presentation.) It was then presented to the Supreme Court of Delaware, with citation to the specific page of a recent Third Circuit opinion in which that court cited *Hansberry* v. *Lee*, 311 U.S. 32, 45 (1940), for the propo-

sition, in the Third Circuit's own words on the page cited by petitioner, "that it would violate due process to bind an inadequately represented party to a prior judgment." *In Re Real Estate Title and Settlement Services Litigation*, 869 F.2d 760, 769 (3d. Cir.), *cert. denied*, 493 U.S. 821 (1989). This is thus hardly a situation like *Webb* v. *Webb*, 451 U.S. 493 (1981), on which respondents heavily rely; for there "nowhere did [the petitioner] cite to the Federal Constitution or to any case relying on [the relevant clause] of the Federal Constitution." 451 U.S. at 496. Nor has this case anything in common with *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71 (1988), relied on by respondents, where in the state supreme court the petitioner had made only vague references to the punitive damages award complained of, as "constitut[ing] excessive fine and violat[ing] constitutional principles," without ever making it clear that it was the *federal* constitution that was referred to. 486 U.S. at 77-78.

The issue thus having been presented to the court below, that court was empowered to decide it under the plain language of its own Rule 8, which liberalizes the traditional narrowness of appellate review and allows the court, where the interests of justice require, to consider and determine a question not presented to the trial court. We are aware of no requirement, as suggested by respondents, that an appellant affirmatively "invoke" this provision by "request[ing] that the Delaware Supreme Court apply this exception" [*sic*]. Respondents' Brief in Opposition (hereinafter "Resp. Br.") 13. On the contrary, it would appear from the only case under Rule 8 cited by respondents that when the Supreme Court of Dela-

ware declines to consider an issue on the ground that it was not raised in the trial court, the court itself "invokes" Rule 8 explicitly. *Peterson* v. *Hull*, 421 A.2d 1350, 1354 (Del. 1980). It did not do so here. (Nor did respondents ask it to do so.) By the same token, there is no room here for any assumption that any failure of the state appellate court to discuss a question was due to want of proper presentation in the state courts; that principle simply triggers the need to examine the record, and leads to a holding of lack of jurisdiction if it cannot be determined from the record that the question was raised. *Bailey* v. *Anderson*, 326 U.S. 203, 207 (1945). (We note that in *Street* v. *New York*, 394 U.S. 576 (1969), which respondents cite for this principle, the Court examined the record and concluded that the petitioner's oral statements *did* adequately present the issue there involved. 394 U.S. at 582-83.)

The question having been *presented* below, it was plainly *decided* against petitioner, albeit *sub silentio*; the court below could not have affirmed the Court of Chancery otherwise. It is not essential that the state court's denial of the federal claim "shall have been put in direct terms" to support this Court's jurisdiction; it is sufficient "if the necessary effect of the judgment has been to deny the claim." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). And that was assuredly true here.[1]

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[1] This case thus has nothing in common with *Yee* v. *City of Escondido*, 112 Sup. Ct. 1552 (1992), cited by respondents. In *Yee* the issue which the Court refused on jurisdictional grounds to hear could have been raised in the lower courts (unlike the issue here), but was not raised until a petition for discretionary review by the state supreme court, which denied the petition—

In sum, respondents' jurisdictional argument simply does not survive examination of the opinions quoted from to support it; nor has this case anything in common with cases where the petitioner had merely invoked vague "generic" constitutional requirements.

II. Respondents' Contentions as to the Merits of the Petition Underscore the Need for Guidance From This Court

Respondents' arguments on the merits of the petition, we submit, are so crafted as to miss the point. Indeed, their net effect is to underscore the need for guidance from this Court as to the obligations of a state court confronted by abundant indicia that a class action settlement is a sham.

Respondents make two main arguments. The first is that the essential elements of due process were in fact afforded below. The second is that further discovery was available to petitioner, he did not take advantage of it, and this somehow negates his position here.

As to the first argument: It is of course true that essential elements of due process in a class action settlement include adequate notice, adequate representation, and an opportunity to be heard. See Resp. Br. 15.[2] But it begs the present question to stop there.

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an action which, like denial of certiorari here, expresses no view on the merits. Thus in *Yee* the question had been *neither* raised *nor* decided below. 112 Sup. Ct. at 1531.

[2] Resp. Br. 15 refers to due process requiring "adequate representation of [the absent class members'] interests *at settlement hearings*" (emphasis added). That is true as far as it goes, but due process "of course requires that the named plaintiff *at all*

This case goes on to the further question: Given that adequacy of representation is required, how is it to be determined? In Delaware a class action settlement is not a mere adversary proceeding with the court as arbiter. The court is under an affirmative duty to "exercise[] a judgment of its own as to the fairness and adequacy of the proposed settlement, act[ing] on behalf of the absent class members and seek[ing] to protect and advance their interests," Petition for Certiorari (hereinafter "Pet.") 16a, applying its own "sound business judgment" and acting to some extent as "the so-called third party to the settlement." *Rome* v. *Archer*, 197 A.2d 49, 53 (Del. 1964).[3] And this duty was heightened here by the inability of class members to opt out. Having thus undertaken to represent the absent members, is that representation adequately discharged by ignoring a constellation of suspicious circumstances, including a pre-certification settlement, attorneys' fees to be paid by defendants, a "clear sailing" agreement as to those fees, an extraordinarily high fee, no evidence to justify its amount, evasiveness in giving information about the deal, only modest discovery, speculative class benefits,

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times adequately represent the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

[3] Absent class members thus rely on the Chancery Court of Delaware to represent them in a class action settlement hearing to a greater extent than under federal Rule 23, where "[c]ourts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching." *McNary* v. *American S. & L. Assn.*, 76 F.R.D. 644, 649 (N.D. Texas 1977); *accord*, *Zerkle* v. *Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971); *Glicken* v. *Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y 1964).

and a sweeping release? We think it is not. Respondents evidently think it is.[4] This Court should decide.

Respondents' second argument, that petitioner should have taken more discovery, again might fit with a wholly adversary proceeding in which the court is a neutral arbiter limited to considering only what the parties put before it. The argument is inapposite to this situation, in which the court is obliged to represent the absent class members. Even under federal Rule 23, the court's "duty under Rule 23(e) cannot and should not be delegated to the litigants' attorneys." *Foster* v. *Boise-Cascade, Inc.*, 420 F.Supp. 674, 680 (S.D. Texas 1976), *aff'd.*, 577 F.2d 335 (5th Cir. 1978). Moreover, respondents' argument leaves an inaccurate impression of the situation below. The

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[4] Respondents suggest that the Court of Chancery in fact did consider and reject at least some of these indicia of a sham transaction. To justify this they reduce our nine listed indicia to five and rewrite them so as to refer not to facts but to general topics. Compare Pet. 16-17 with Resp. Br. 17-18.

We note here three subsidiary points. First, respondents' comment that petitioner did not object to the class certification, Resp. Br. 8, overlooks the fact that the class had already been certified as a non-opt-out class. Pet. 3a. Second, respondents say that the plaintiffs below "had no practical alternative but to attempt to settle the action sooner rather than later." Resp. Br. 19. But the *plaintiffs* could have continued to fight; the real situation was that named plaintiffs' *counsel* "had no practical alternative but to attempt to settle the action sooner rather than later" if they were to make a Delaware deal involving generous attorneys' fees. Third, we note that the out-of-context extract from oral argument printed at Resp. Br. 9a was obviously a response to the question asked by the judge and not a limitation of petitioner's contentions below, as suggested at Resp. Br. 11 n.7 and 14.

case on which respondents heavily rely, *In Re Amsted Industries Litigation*, 521 A.2d 1104 (Del. Ch. 1986), does not grant to objectors quite so broad a charter for liberal discovery as respondents suggest it does. *Amsted* was a *nisi prius* ruling by one trial judge on a motion to compel answers to discovery, outlining the principles he applied in considering the requests before him in a settlement proceeding. The case makes it abundantly clear that such discovery is not available as a matter of right but is closely controlled by the court, 521 A.2d at 1107; and, of particular interest here, in that case the motion to compel answers to discovery was *denied*, because the parties were engaged in informal discovery. *Id.* at 1110. Informal discovery was what petitioner here sought below. Pet. 10, 91a, 94a-97a, 99a, 102a. The named plaintiff's counsel evidently concurred in this approach, for when petitioner's counsel charged him with failure to respond to informal discovery, he justified his inaction not on the ground that petitioner should have moved for formal discovery, but on the ground that he had told petitioner's counsel to speak with his partner who was more knowledgeable about the settlement. Pet. 102a. Yet now respondents say petitioner should have requested formal discovery after all!

All this, however, is beside the point. The real point is that even without further discovery the Court of Chancery had abundant indications that the settlement was a sham. We contend that being charged with a fiduciary responsibility as guardian of the rights of absent class members, it had an affirmative duty to act on these indications, order appropriate discovery and/or live testimony on its own initiative, ensure that a record was developed, and articulate

its conclusions from that record. Adapting again the language of *Protective Committee* v. *Anderson*, 390 U.S. 414 (1968): "[T]o the extent that the record contains solid facts of the sort necessary for appraising" the *bona fides* of the settlement, "virtually all of them point to the probable existence of a" sham transaction. "Balancing these facts are nothing but bald assertions to the contrary and general conclusions for which foundations nowhere appear. Particularly noteworthy is the fact that, despite frequent requests for an investigation, and notwithstanding the fact that available evidence pointed to" a sham transaction, "no investigation of these matters was ever undertaken or ordered by the trial court. It is difficult to understand how an informed and independent decision . . . could have been reached on the present state of the record." 390 U.S. at 438-40. Respondents, and the Delaware judicial system, plainly disagree. That, again, is why this Court's guidance is needed.[5]

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[5] That the question presented is of broad public significance is underscored by a prominently featured article in the general media that appeared just too late to be included with the citations to articles in the legal media set forth at Pet. 15. Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature: Heart Valves to Agent Orange*, WALL STREET JOURNAL, June 26, 1992, p. 1, col. 1.

III. Conclusion

Respondents' contention that this Court lacks jurisdiction rests on cases that deal with very different situations from this one. Their contentions on the merits of the petition simply point up the need for clear guidance from this Court. The petition for certiorari should be granted.

Respectfully submitted,

THADDEUS HOLT
910 16th Street N.W.
Suite 400
Washington, D.C. 20006
202-223-9010
Attorney for Petitioner
(Counsel of Record)

August 4, 1992